

STATE OF MICHIGAN
COURT OF APPEALS

TRACY ANN CORNELL,

Plaintiff-Appellee,

v

JEFFREY LEE CORNELL,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 264327

Branch Circuit Court

LC No. 98-009678-DM

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from a lower court order dismissing his motion for a change of custody. We affirm.

Plaintiff and defendant were married on April 27, 1991 and divorced on May 6, 1999. Plaintiff has primary physical custody of the parties' child, while defendant has parenting time for six out of every fourteen days; the parties alternate weeks during summer vacation, holidays and spring breaks.

On August 18, 2004, defendant filed a motion for a change of custody, asserting that there had been a change in circumstances constituting a substantial and compelling reason to modify custody. This alleged change in circumstance was that the parties' child had been diagnosed with ADHD in March 2003 and plaintiff had refused to acknowledge and treat this condition until June 2004, which delay was detrimental to the child's well being. Plaintiff denied that any change in custody was warranted and denied any medical neglect. The trial court referred the matter to the Friend of the Court for investigation and recommendation, which recommended that defendant's motion be denied. Thereafter, plaintiff filed a motion to dismiss defendant's motion for a change in custody. Ultimately, the trial court granted plaintiff's motion to dismiss, concluding that defendant failed to establish a legally sufficient change of circumstances to warrant reopening the issue of custody.

Defendant argues that the trial court erred in dismissing his motion for a change of custody. We disagree. Whether a movant is entitled to an evidentiary hearing on a motion for change of custody depends on whether the movant has established by a preponderance of the evidence proper cause or change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 512, 508-509, 514; 675 NW2d 847 (2003). Whether the facts asserted by the movant are legally

sufficient to meet that standard is a question of law. This Court reviews questions of law de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996).¹

A custody award may be modified only upon a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interest. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). To constitute proper cause, a movant must show grounds that have or could have a significant impact on the child's life such that a reevaluation of custody should be made; that is, "grounds of a magnitude to have a significant effect on the child's well-being to the extent that revisiting the custody order would be proper". *Vodvarka, supra* at 511-512. To constitute a change of circumstances, a movant must show that since entry of the most recent custody order, there has been a material change in conditions relating to custody of the child that has had or could have a significant impact on the child's well being. *Id.* at 513. In each case, the determination whether there is proper cause or a change in circumstances should be based on a consideration of the statutory best interest factors. *Id.* at 511-512. In the present case, the factor at issue is MCL 722.23(c), the capacity and disposition of plaintiff to provide the child with medical care. Defendant is essentially alleging medical neglect by plaintiff.

Defendant alleged that there had been a change of circumstances in that parties' child had been diagnosed with ADHD and plaintiff had refused to acknowledge and treat this condition for over a year. However, the deposition of the child's treating physician established that plaintiff did not ignore the possibility that the child had ADHD, but rather that she first sought therapy for his apraxia (another condition with which he had been diagnosed and which the doctor acknowledged was a contributing factor to some of his behaviors) and that plaintiff pursued options other than medication until it was clear that those options were not achieving desired results. The doctor also testified that once it was decided that medication was an option that needed to be pursued, plaintiff was "more than ready" to pursue it and was active in monitoring the efficacy and side effects of the medication. Indeed it was plaintiff who took the lead in getting the medication started before the start of the next school year. According to the child's treating doctor, plaintiff's course of conduct in seeking treatment for the child was a reasonable, albeit cautious, one and not one of medical neglect. Therefore, the trial court did not err in determining that defendant had not established any legally sufficient change in circumstances to warrant the holding of an evidentiary hearing.

¹ Defendant contends that the trial court erred in applying a clear and convincing standard to the determination of whether he established a legally sufficient change of circumstances. Of course defendant is correct that the proper standard is preponderance of the evidence. *Vodvarka, supra* at 508-509, 512. Our review of the record indicates that the trial court's articulation of a clear and convincing evidence standard was referring to the standard that would operate *if* defendant established a legally sufficient change of circumstances. Even if the trial court misstated the standard of proof applicable to the showing of such a change, however, such misstatement is of no matter to the instant appeal because as noted above, whether the facts meet the standard is a legal question which this Court will review de novo.

Defendant next asserts that plaintiff was not authorized by court rule or other law to file a motion to dismiss defendant's motion, and that plaintiff's motion to dismiss was filed and noticed improperly. We agree that the trial court may have erred, as a technical matter, in granting plaintiff's motion to dismiss defendant's motion. As this Court noted in *Vodvarka*, *supra* at 504 n 6, it is "question[able] whether a motion to dismiss is the proper procedure for attacking another motion or petition. See MCR 2.116(C)(1)-(10). None of these subrules provide an avenue to attack the validity of a another motion." However, as plaintiff's motion to dismiss defendant's motion was, in effect, nothing more than a supplemental answer to defendant's motion for a change in custody, setting forth further argument and legal authority for denial of that motion, defendant can show no prejudice resulting from any procedural error in this regard. Therefore, reversal on this basis is not warranted. MCR 2.613.

Nor was defendant deprived of due process by any irregularity relating to notice. Generally, due process is satisfied when a party is given notice that is reasonably calculated to apprise the party of proceedings that may directly and adversely affect their legally protected interests, and which affords them an opportunity to respond. *Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995). Certainly, defendant was keenly aware of all proceedings in this case and of plaintiff's assertion that his motion lacked merit. Defendant had more than six months to respond to the assertions set forth in plaintiff's motion to dismiss and defendant was well aware that the trial court intended to look to the deposition of the child's treating doctor to determine whether a legally sufficient change in circumstances had been established such that a full hearing on custody was warranted. Defendant was also well aware that the June 30, 2005 hearing, which was noticed by defendant, was for the purpose of addressing defendant's motion to dismiss.

Defendant next argues that the trial court erred in offering defendant the opportunity to proceed with the evidentiary hearing even after it had dismissed his motion for a change of custody, while at the same time indicating that it would award plaintiff attorney fees if defendant elected to so proceed. We disagree. Once the trial court denied defendant's motion, defendant's appropriate remedy was to appeal that ruling, which right was no way impeded by the trial court's action. Defendant offers this Court no authority establishing that he had a right to proceed with an evidentiary hearing in the trial court to make a record for appeal. Thus, that the trial court offered defendant the opportunity to do so subject to payment of plaintiff's costs affords defendant no grounds for complaint.²

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff

² Defendant premises his argument on an assertion that the trial court stated a change of circumstances on the record before denying his motion. However, contrary to this assertion, the trial court found that no legally sufficient change of circumstances had occurred.